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South Carolina's Public Sale Procedures under the Uniform Commercial Code Revised Article 9 - Secured Transactions

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Murray: South Carolina's Public Sale Procedures under the Uniform Commercial Code

SOUTH CAROLINA'S PUBLIC SALE PROCEDURES

UNDER THE UNIFORM COMMERCIAL CODE

REVISED ARTICLE 9 – SECURED TRANSACTIONS

I. INTRODUCTION

In addition to enacting the 1972 Official Text of the Uniform Commercial Code Article 9, Secured Transactions, in 1989 (Former Article 9), South Carolina also enacted a “safe harbor” for public dispositions of collateral for a secured party who substantially complies with the Public Sale Procedures.¹ These provisions are, with very slight variations, a verbatim version of provisions that North Carolina has had in effect since 1967.² In 2001, South Carolina adopted Revised Article 9, Secured Transactions, of the Uniform Commercial Code (Revised Article 9). While North Carolina repealed its version of the Public Sale Procedures,³ South Carolina retained the Public Sale Procedures in conjunction with Revised Article 9.⁴ The continuation of the Public Sale Procedures is contrary to the goals of the default provisions of Revised Article 9, which encourage private dispositions of collateral. It is believed that private dispositions result in higher proceeds on the collateral.⁵

The Public Sale Procedures greatly reduce protections afforded to debtors when a secured party attempts to dispose of collateral after a debtor defaults on a security

1. See S.C. CODE ANN. § 36-9-601 (Law. Co-op. 1976) (current version at S.C. CODE ANN. § 36-9-629).

2. The North Carolina and South Carolina provisions are identical except for insignificant stylistic changes and references to their respective code sections. The following are the South Carolina Public Sale Procedures provisions with their North Carolina equivalent: S.C. CODE ANN. § 36-9-629 (West 2003) (disposition of collateral by public sale) and N.C. GEN. STAT. § 25-9-601 (repealed 2000); S.C. CODE ANN. § 36-9-630 (West 2003) (contents of notice of sale) and N.C. GEN. STAT. § 25-9-602 (repealed 2000); S.C. CODE ANN. § 36-9-631 (West 2003) (posting and mailing notice of sale) and N.C. GEN. STAT. § 25-9-603 (repealed 2000); S.C. CODE ANN. § 36-9-632 (West 2003) (exception as to perishable property) and N.C. GEN. STAT. § 25-9-604 (repealed 2000); S.C. CODE ANN. § 36-9-633 (West 2003) (postponement of public sale) and N.C. GEN. STAT. § 25-9-605 (repealed 2000); S.C. CODE ANN. § 36-9-634 (West) (procedure upon dissolution of order restraining or enjoining sale) and N.C. GEN. STAT. § 25-9-606 (repealed 2000); and S.C. CODE ANN. § 36-9-635 (West 2003) (disposition of proceeds of sale) and N.C. GEN. STAT. § 25-9-607 (repealed 2000).

3. See 2000 N.C. Sess. Laws 169. For an in-depth look at the policy considerations in repealing the Public Sale Procedures, see Raymond E. Dunn, Jr., Comment, *The Standard of Commercial Reasonableness in the Sale of Repossessed Collateral By Secured Creditors in North Carolina*, 15 WAKE FOREST L. REV. 71, 86–88 (1979).

4. See S.C. CODE ANN. § 36-9-629 (West 2003). Revised Article 9 went into effect on July 1, 2001. 2001 S.C. Acts 67. At this time South Carolina court has adjudicated any part of the Public Sale Procedures under either Former Article 9 or Revised Article 9.

5. S.C. CODE ANN. § 36-9-610 cmt. 2 (Law. Co-op. 1976).

agreement.⁶ Parties involved in secured transactions in South Carolina must recognize the changes that the Public Sale Procedures make in the disposition provisions of Revised Article 9.

To avoid litigation on whether a disposition was commercially reasonable, a secured party should make every effort to dispose of collateral by a public disposition that complies with the Public Sale Procedures.⁷ If a secured party chooses not to follow the Public Sale Procedures, the disposition of the collateral is open to litigation to determine if the disposition was commercially reasonable.⁸ A secured party may be liable for statutory damages should the disposition be deemed commercially unreasonable.⁹ If the collateral is consumer goods, the statutory damages available under South Carolina Code section 36-9-625 are available regardless of whether the debtor suffered any damages.¹⁰ The minimum damages a debtor could recover would be the "credit service charge plus ten percent of the principal amount of the [debt,] or the time-price differential plus ten percent of the cash price."¹¹

A debtor must realize that under the Public Sale Procedures, he may receive notice only five days before the public disposition of the collateral.¹² If a secured party complies with the Public Sale Procedures, a debtor will not be able to challenge the amount received at the disposition, even if no bidders attend.¹³

This Comment examines the issues of South Carolina's Public Sale Provisions under Revised Article 9 of the Uniform Commercial Code. Part II provides the background on Revised Article 9 and some of the provisions relating to the disposition of collateral by secured parties. Part II also explores the application of the Public Sale Procedures and how a secured party qualifies for the "safe harbor"

6. The Drafting Committee for Revised Article 9 took the stance that the new rules would not diminish consumer protections, and that the real issue was how many additional consumer protections would be added. Marion W. Benfield, Jr., *Consumer Provisions in Revised Article 9*, 74 CHI.-KENT L. REV. 1255, 1258 (1999). Providing for a statutory presumption of commercial reasonableness reduces the protections for debtors in the Revised Article 9.

7. Situations where a secured party cannot dispose of collateral through a public disposition may include items so unique as to have potentially only one or two buyers.

8. See S.C. CODE ANN. § 36-9-610(b)–612(l)(West 2003).

9. *Id.* § 36-9-625.

10. *Id.* § 36-9-625(c)(2) & cmt. 4. For nonconsumer goods transactions the debtor must show damages. *Id.* § 36-9-625(b) & cmt. 3.

11. *Id.* § 36-9-625(c)(2) & cmt. 4. The terms "credit service charge," "principal amount," "time-price differential," and "cash price" are not defined in the Code and are left to judicial interpretation. *Id.* § 36-9-625 cmt. 4. In 2000, the courts certified a class action seeking damages from allegedly defective notices as provided by South Carolina Code section 36-9-504 (repealed 2000). *Middleton v. Sunstar Acceptance Corp.*, No. Civ. A 98-CP-07-1131 2000 WL 33385388, at *8 (S.C. Com. Pl. 2000). South Carolina Code section 36-9-507 provided the same statutory damages framework as provided under section 36-9-625 for consumer goods.

12. S.C. CODE ANN. § 36-9-631(1) (West 2003).

13. See *Wachovia Bank & Trust Co. v. Murphy*, 245 S.E.2d 101, 103 (N.C. Ct. App. 1978) (finding allegations of low price do not warrant a hearing if there was compliance with the Public Sale Procedures).

protections. Part III analyzes how North Carolina courts interpreted the Public Sale Procedures notice provisions and predicts how South Carolina courts will implement these provisions. Finally, Part IV explores whether the presumption of commercial reasonableness violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

II. BACKGROUND

A. Public Dispositions Under Revised Article 9 of the Uniform Commercial Code

Revised Article 9, Secured Transactions, of the Uniform Commercial Code is broader in scope than Former Article 9, yet continues to provide an overall "scheme for the regulation of security interests in personal property and fixtures."¹⁴ The Article 9 Drafting Committee approved Revised Article 9 in 1998 after fifteen meetings over five years.¹⁵

One of the top revision priorities of the Article 9 Drafting Committee was the default provisions of Part 5 of Former Article 9.¹⁶ One of the most important provisions in Part 5 was that all aspects of a secured party's disposition of collateral must be "commercially reasonable."¹⁷ However, the concept of what was "commercially reasonable" under Part 5 of Former Article 9 was among the most litigated areas in the UCC.¹⁸ The Drafting Committee revised the default and enforcement provisions of former Part 5 in a new Part 6 of Revised Article 9 to eliminate much of the uncertainty and litigation surrounding the disposition of collateral by secured parties.¹⁹

Formerly, South Carolina Code section 36-9-504 provided for the "[s]ecured party's right to dispose of collateral after default."²⁰ A secured party was able to dispose of collateral in its current condition, or after reasonable preparation, after default by selling, leasing, or any other disposition that was commercially reasonable.²¹ The Code further provided how a secured party was to apply the proceeds of the disposition and that, unless otherwise agreed, the debtor was entitled to any surplus or was liable for any deficiency.²²

14. See S.C. CODE ANN. § 36-9-101 cmt. 1 (West 2003); 11 RONALD A. ANDERSON & LARY LAWRENCE, *ANDERSON ON THE UNIFORM COMMERCIAL CODE*, § 9-101:1, at 1 (3d ed. 1999).

15. § 36-9-101 cmt. 2.

16. Donald J. Rapson, *Default and Enforcement of Security Interests Under Revised Article 9*, 74 CHI.-KENT L. REV. 893, 893 (1999).

17. 2 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 43.1, at 1183 (1965).

18. Rapson, *supra* note 16, at 893.

19. *Id.* at 895; see also S.C. CODE ANN. § 36-9-101 cmt. 4(i) (West 2001) (describing the changes reflected in Part 6).

20. S.C. CODE ANN. § 36-9-504 (repealed 2000).

21. *Id.* § 36-9-504(1).

22. *Id.*

South Carolina Code section 36-9-504(3) provided guidance for the secured party on how to dispose of the collateral.²³ The secured party was given wide latitude in disposing of the collateral so long as every aspect of the disposition was commercially reasonable.²⁴ Aspects of the disposition that must be commercially reasonable included the “method, manner, time, place and terms.”²⁵ South Carolina Code section 36-9-504(3) further provided that for a public disposition, a secured party must send reasonable notification to the debtor and that the contents of the notice must also be reasonable.²⁶ This was the extent of the guidance for secured parties regarding the notice given to debtors before a public disposition. The Code contained no specific notice requirements and no “safe harbor” provisions.²⁷

Revised Article 9 provides more guidance for a secured party on the information that must be disclosed in the notice of disposition—information that should better inform the debtor on how to protect their rights and property.²⁸ Generally, the notice must disclose the names of the debtor and secured party, a description of the collateral, the method of disposition, a statement “that the debtor is entitled to an accounting of [any] unpaid indebtedness” and the charge for such an accounting, and the time and place of the disposition.²⁹ In addition to the general provision, a secured party must also include the following information in a consumer goods disposition: A description of any deficiency of the person to which the notification is sent, a telephone number from which the amount required to redeem the collateral can be obtained, and a telephone number or mailing address where additional information may be obtained.³⁰ Both section 36-9-613, entitled Contents and Form of Notification Before Disposition of Collateral: General, and section 36-9-614, entitled Contents and Form of Notification Before Disposition of Collateral: Consumer-Goods Transactions, provide forms for consumer and non-consumer goods dispositions, respectively, that are deemed, when completed, to provide sufficient information as a matter of law.³¹ If a secured party does not use the forms provided in the statute, the reasonableness of the content of the notice becomes a question of fact.³² If a secured party does not provide notice to the

23. *Id.* § 36-9-504(1).

24. *Id.*

25. *Id.*

26. S.C. CODE ANN. § 36-9-504(3) (repealed 2000). The burden of proving that the disposition was commercially reasonable is on the secured party. *Mid-Continent Refrigerator Co. v. Carpenter*, 287 S.C. 624, 625, 340 S.E.2d 559, 560 (Ct. App. 1986).

27. *See Benfield*, *supra* note 6, at 1268.

28. *Id.*; *see also Crane v. Citicorp Nat'l Servs., Inc.*, 313 S.C. 70, 73, 437 S.E.2d 50, 52 (1993) (stating that “[t]he purpose of the notice was to allow the debtor to discharge the debt and redeem the collateral, produce another purchaser, or see that the sale is conducted in a commercially reasonable manner”); *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 384, 534 S.E.2d 688, 695 (2000) (quoting *Crane*, *supra*).

29. S.C. CODE ANN. § 36-9-613(1) (West 2003).

30. *Id.* § 36-9-614(1).

31. *See id.* § 36-9-613(5); § 36-9-614(3).

32. *See id.* § 36-9-611(b).

debtor, or if notice is found to be deficient, there is a rebuttable presumption that the value of the collateral is equal to the debt owed.³³

The general rule continues to be that timeliness of the notification is a question of fact;³⁴ however, Revised Article 9 gives secured parties a safe harbor when dealing with nonconsumer goods.³⁵ The Drafting Committee of Revised Article 9 provided that in dispositions of nonconsumer goods, "notification . . . sent after default and ten or more days before the . . . disposition" is reasonable as a matter of law.³⁶ Under Former Article 9, notice was found to be timely in other jurisdictions if the notice was sent between seven and fourteen days, and was found insufficient if sent less than five days before the disposition.³⁷ No South Carolina court ever considered the question of whether a notice of public disposition was timely under Former Article 9.

B. South Carolina's Public Sale Procedures

South Carolina adopted Revised Article 9, including the default and enforcement provisions in Part 6, in 2001, while maintaining the Public Sale Procedures.³⁸ These extra provisions providing a safe harbor for public dispositions are not part of the "Official Text of the U.C.C." and seem to be solely in effect in South Carolina at this time.³⁹

South Carolina Code sections 36-9-629 through 36-9-635 are South Carolina's Public Sale Procedures.⁴⁰ A secured party who substantially complies with these sections is conclusively considered to have conducted a public disposition in a

33. See *id.* § 36-9-626(a)(3)-(4) (non-consumer goods transactions). But see *id.* § 36-9-626(b) (providing that consumer goods transactions will be treated differently). Once a debtor raises the issue that the secured party did not comply with the provisions of Part 6 of Revised Article 9, the secured party has the burden of establishing that the disposition was in compliance with the provision. S.C. CODE ANN. § 36-9-626(a)(2) (West 2003). If the secured party fails to meet this burden, then the presumption arises that had the disposition been conducted in a reasonable manner, the proceeds of the disposition would have equaled the entire obligation. *Id.* § 36-9-626(a)(3)-(4). The secured party is then allowed to prove that there would have been a deficiency even if the disposition had been conducted reasonably. *Id.*; see also *Republic Nat'l Bank v. DLP Indus., Inc.*, 314 S.C. 108, 110, 441 S.E.2d 827, 829 (1994) (applying Former Article 9); *Andrews v. Von Elten & Walker, Inc.*, 315 S.C. 199, 203, 432 S.E.2d 500, 503 (Ct. App. 1993) (applying Former Article 9); *Mathias v. Hicks*, 294 S.C. 305, 309, 363 S.E.2d 914, 917 (Ct. App. 1987) (applying Former Article 9).

34. See ANDERSON & LAWRENCE, *supra* note 14, at 952.

35. *Id.* at 953.

36. S.C. CODE ANN. § 36-9-612(b) (West 2003).

37. See ANDERSON & LAWRENCE, *supra* note 14, at 952. "The concept of commercial reasonableness has been notoriously difficult to define and has therefore been unevenly applied by courts and juries." *N.C. Nat'l Bank v. Burnette*, 256 S.E.2d 388, 391 (N.C. 1979).

38. See S.C. CODE ANN. §§ 36-9-101, -629 (West 2003).

39. See generally *ITT-Indus. Credit Co. v. Milo Concrete Co.*, 229 S.E.2d 814, 819 (N.C. Ct. App. 1976) (discussing the state of the law at the time in North Carolina and the United States).

40. § 36-9-629 reporter's cmt. (West 2003).

reasonable manner.⁴¹ These provisions were preserved to minimize litigation arising from debtors questioning whether a public disposition by a secured party was commercially reasonable.⁴²

To be within the safe harbor created by the Public Sale Procedures, a secured party must send notice that is in substantial compliance with the Code's requirements for posting and mailing notice of sale.⁴³ The contents of the notice must comply with both section 36-9-630, and either section 36-9-613 for non-consumer goods transactions, or section 36-9-614 for consumer goods transactions.⁴⁴ In addition to the information required in the notice by section 36-9-613 or section 36-9-614, section 36-9-630 requires the following additional information: a reference to the security agreement; a description of the property as it is described in the security agreement; any terms of the disposition as provided by the security agreement, including any cash deposit that may be required of the highest bidder; and a statement that the property will be sold subject to any taxes or special assessments.⁴⁵

It is possible for a secured party to comply with section 36-9-630 and not comply with either section 36-9-613 or section 36-9-614. Since a secured party only needs to substantially comply with the Public Sale Procedures to have a disposition deemed commercially reasonable,⁴⁶ it will be up to the court to determine if the notice substantially complies with either section 36-9-613 or section 36-9-614. South Carolina courts may follow North Carolina's lead in allowing a wide variance between what the Public Sale Procedures require and what the courts find to be in substantial compliance.⁴⁷ However, South Carolina courts may be inclined to follow the Reporter's Comment to South Carolina Code section 36-9-630, and find that the content of the notice must comply with section 36-9-630 and with either section 36-9-613 or section 36-9-614.⁴⁸ Should the courts follow the Reporter's Comment, debtors will potentially have a claim for damages under

41. *Id.* § 36-9-629. Compliance with the Public Sale Provisions, judicially approved dispositions, or dispositions approved by representatives of the creditor are the only "safe harbor" dispositions at this time. *Id.* § 36-9-629 reporter's cmt.

42. See generally *ITT - Indus. Credit Co.*, 229 S.E.2d at 819 (stating that the North Carolina General Assembly enacted the Public Sale Procedures to minimize difficulties arising from N.C. Gen. Stat. section 25-9-504(3)). "Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation." *Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

43. S.C. CODE ANN. § 36-9-631 (West 2003).

44. *Id.* § 36-9-630 reporter's cmt.

45. *Id.* § 36-9-630.

46. *Id.* § 36-9-629.

47. See generally *Triad Bank v. Elliott*, 399 S.E.2d 1, 4 (N.C. Ct. App. 1990) (holding that a notice stating the wrong year of a car was in substantial compliance); *Graham v. Northwestern Bank*, 192 S.E.2d 109, 111-12 (N.C. Ct. App. 1972) (finding that a notice posted on the courthouse bulletin board containing multiple errors as to the dates of six security agreements to be in substantial compliance).

48. § 36-9-630 reporter's cmt.

section 36-9-625,⁴⁹ and a claim to reduce or eliminate any deficiency under section 36-9-626.⁵⁰

The provision of the Public Sale Procedures dealing with the posting and mailing of the notice of a public disposition is the greatest departure from Revised Article 9. The timeliness of a secured party's notification of a public disposition is sufficient if, at least five days prior to the disposition, the notice is posted on a bulletin board in the courthouse of the county in which the disposition is to occur and the secured party sends by registered or certified mail a copy of the notice to each debtor.⁵¹ This presumption of timeliness is shorter than what has been established as commercially reasonable notice in other jurisdictions,⁵² and creates inconsistencies between some of the notice requirements.⁵³ If the goods to be sold are anything other than consumer goods, the secured party must also send by registered or certified mail a copy of the notice "to any other secured party from whom the secured party has received . . . [a] written notice of a claim."⁵⁴ A secured party only has to notify other secured parties that have sent written notice before the secured party sends notice to the debtor.⁵⁵ A secured party must compute the five-day time frame by excluding the initial day of posting and mailing, and include the day of the disposition.⁵⁶

South Carolina Code section 36-9-632 gives the secured party the ability to accelerate the disposition of perishable property.⁵⁷ If the secured party believes the collateral will rapidly deteriorate or depreciate, the secured party may apply with the clerk of court for a quicker public disposition than provided by the Public Sale Provisions. The secured party must report that the collateral is deteriorating and

49. In nonconsumer goods dispositions, the debtor must prove actual damages. *Id.* § 36-9-625(b). In consumer goods dispositions, the secured party may be liable for damages regardless of actual harm. *Id.* at (C)(2); see *supra* notes 10–11 and accompanying text.

50. S.C. CODE ANN. § 36-9-626 (West 2003).

51. *Id.* § 36-9-631. The notice must be mailed either to the actual address of the debtors, if known, or to any address provided by the debtors in writing, or, as a last resort, to the last known address. *Id.* § 36-9-631 (2)(a)-(b).

52. See *supra* notes 37 and accompanying text.

53. § 36-9-631 reporter's cmt.

54. *Id.* § 36-9-631(2)(c). This subsection requires a secured party to, potentially, contact fewer other secured parties than South Carolina Code section 36-9-611 requires. *Id.* § 36-9-631 reporter's cmt. South Carolina Code section 36-9-611 requires a secured party to notify any secondary obligor in the case of consumer goods. *Id.* § 36-9-611(b). Additionally, for nonconsumer goods a secured party must also notify any other secured party that held a security interest in the goods ten days before the notification date if the security interest was perfected by the filing of a financing statement or by compliance with a statute, regulation, or treaty as described in section 36-9-311(a). *Id.* § 36-9-611 (c)(3).

55. § 36-9-631(2)(c).

56. *Id.* § 36-9-631(4). The providing of a five-day minimum for mailing and posting contradicts the provisions of South Carolina Code section 36-9-612 and established case law, on the reasonableness of a timely notice. See § 36-9-612; *supra* note 33, and accompanying text.

57. S.C. CODE ANN. § 36-9-632 (West 2003).

provide a description of the property.⁵⁸ If the clerk agrees that the collateral is perishable, the clerk shall order the collateral sold “at a time and place and upon notice, if any, as he considers advisable.”⁵⁹

A secured party may postpone a disposition up to six days, not including Sundays, “when there are no bidders,” when the number of bidders is reduced due to weather or casualty, when there are an excessive number of dispositions on the same day, when the secured party is too ill, or for any other good cause.⁶⁰ Once the secured party decides to postpone the disposition, he or she must announce the postponement at the time and place advertised in the disposition, and, on the same day, post on the courthouse bulletin board a notice of postponement.⁶¹ The posted notice of postponement must state that the disposition is postponed, state when the next disposition will be held, state the reason the disposition was postponed, and be signed by the secured party or the party’s agent.⁶²

Should a secured party not comply with the default provision of Revised Article 9, a debtor may move the court to restrain the disposition of the collateral.⁶³ If the secured party is disposing of the collateral under the Public Sale Procedures, and the judge dissolves the order restraining the disposition before the date fixed for a disposition, the judge may order the disposition to be held at the time and date stated in the original notice.⁶⁴ The judge may also order, either before or after the date of disposition has passed, the disposition to be delayed, with notice, until the time the court considers appropriate.⁶⁵

III. ANALYSIS

A. Implementation and Interpretation of the Public Sale Procedures in Revised Article 9.

Secured parties are not required to follow the Public Sale Procedures when disposing of collateral,⁶⁶ and a public disposition may still be commercially reasonable even if it fails to comply with the Public Sale Procedures.⁶⁷ However, without the presumption of commercial reasonableness provided by the Public Sale

58. *Id.*

59. *Id.*

60. *Id.* § 36-9-633(1). Should a secured party fail to hold the disposition at the time and place provided for, and the secured party does not follow South Carolina Code section 36-9-633, then the secured party may redo the public disposition process once again by following the Public Sale Procedures. *Id.* at (4).

61. *Id.* § 36-9-633(2).

62. S.C. CODE ANN. § 36-9-633(3) (West 2003).

63. *Id.* § 36-9-625(a).

64. *Id.* § 36-9-634(1).

65. *Id.* § 36-9-634(2).

66. *Id.* § 36-9-629.

67. *See* ITT-Indus. Credit Co. v. Milo Concrete Co., 229 S.E.2d 814, 819 (N.C. Ct. App. 1976).

Procedures, it remains a question of fact whether all aspects of a given disposition were conducted in a commercially reasonable manner.⁶⁸

South Carolina Code section 36-9-629 requires that a secured party only substantially comply with the Public Sale Procedures to be considered commercially reasonable.⁶⁹ Once a secured party has shown that they have substantially complied with section 36-9-629, the court shall conclusively find that the disposition is commercially reasonable in all aspects.⁷⁰ This presumption cannot be overcome even if the debtor claims that the prices or bids received are unreasonably low.⁷¹ In *Shields v. Bobby Murray Chevrolet, Inc.*,⁷² the North Carolina Court of Appeals found that there is no requirement that the collateral even be sold; there simply needs to be an opportunity for public bidding.⁷³

While this conclusion of commercial reasonableness may protect the secured party from statutory damages, under Revised Article 9, a secured party's claim for deficiency may be reduced or eliminated if the secured party or a "person related to" the secured party is the buyer at the public disposition.⁷⁴ South Carolina Code section 36-9-615(f) recognizes that when the secured party or a related party is the buyer of the collateral, the secured party may lack the incentive to obtain the highest price for the collateral.⁷⁵ The court follows a two-step process for calculating the deficiency when the secured party, or a party related to the secured party, is the buyer of the collateral. First, the court must find if the proceeds obtained in the disposition were significantly below the range of proceeds that would have been obtained if an independent party had bought the collateral.⁷⁶ If the court finds that

68. *Id.* at 819–20.

69. § 36-9-629.

70. *Id.*; see *Wachovia Bank & Trust Co. v. Murphy*, 245 S.E.2d 101, 103 (N.C. Ct. App. 1978). There is a prima facie showing that a secured party has substantially complied with South Carolina Code § 36-9-629 when the secured party shows that the contents of the notice were substantially in conformity with section 36-9-630, that the posting and mailing of the notice was in substantial conformance with section 36-9-631, and that the disposition was held as provided by the notice. See *Murphy*, 245 S.E.2d at 103. The court will find as a matter of law whether a secured party has complied with section 36-9-629 upon a prima facie showing of compliance, unless the debtor alleges and produces evidence that the secured party failed to comply with section 36-9-630 or section 36-9-631, or that the disposition was not held in accordance with the notice. See *id.*

71. See, e.g., *Murphy*, 245 S.E.2d at 103 (holding that allegations of low price do not warrant a hearing if there was compliance with the Public Sale Provision); *Graham v. Northwestern Bank*, 192 S.E.2d 109, 113 (N.C. Ct. App. 1972) (finding the price received at a public disposition has been held to be a triable issue without the statutory presumption of commercial reasonableness).

72. 261 S.E.2d 238 (N.C. Ct. App. 1980).

73. *Id.* at 240 (interpreting the Public Sale Procedures under Former Article 9).

74. S.C. CODE ANN. § 36-9-615 (West 2003). A "person related to" an individual secured party is defined as the individual's spouse, sibling or sibling-in-law, ancestor or descendant of the individual or the spouse, or any other relative of the individual who shares the same home. *Id.* § 36-9-102(62). A "person related to" an organizational secured party is defined as a person controlling or controlled by the organization, an officer or director of the organization, and any spouse or relative of such a person. *Id.* § 36-9-102(63).

75. § 36-9-615 cmt. 6.

76. § 36-9-615(f).

the proceeds obtained were significantly below what an independent party would have produced in a commercially reasonable disposition, then the deficiency is calculated based on what the independent party would have received.⁷⁷ Since section 36-9-615(f) recognizes that a public disposition in which the secured party, or a party related to the secured party, buys the collateral can be commercially reasonable, the Public Sale Procedures do not shield a secured party from having its claim for deficiency scrutinized, reduced or eliminated when the secured party is the buyer at the public disposition.

Revised Article 9 permits a notice for the disposition of non-consumer goods to have errors, as long as those errors are not seriously misleading.⁷⁸ However, there is no minor-error provision for a consumer-goods disposition.⁷⁹ Because section 36-9-614 does not provide a minor-error provision for a consumer goods disposition, a court should require a notice to conform to South Carolina Code section 36-9-614 without any error, regardless of how small the error is or if the error causes any harm.⁸⁰ South Carolina has essentially eliminated the minor-error problem in notices for public dispositions of consumer goods in section 36-9-630.⁸¹ In *Graham v. Northwestern Bank*,⁸² the North Carolina Court of Appeals found that a notice posted on the courthouse bulletin board containing multiple errors as to the dates of six security agreements substantially complied with North Carolina General Statutes section 25-9-602.⁸³ Because South Carolina section 36-9-630 is a verbatim copy of North Carolina section 25-9-602, South Carolina courts will likely follow the *Graham* holding and find that the contents of a notice are sufficient even when they contain minor errors, as long as the debtor and public understand what is offered for sale.

Whether a notice is mailed and posted in a reasonable manner is often litigated in states that do not provide a statutory scheme like South Carolina's Public Sale Procedures.⁸⁴ Even with the Public Sale Procedures, questions can arise as to the reasonableness of the notice given. In *Hodges v. Norton*,⁸⁵ the North Carolina Court of Appeals found that simply posting the notice at the courthouse without

77. *Id.*

78. S.C. CODE ANN. § 36-9-613(3) (West 2003).

79. *See id.* § 36-9-614.

80. *See Benfield, supra* note 6, at 1270.

81. All the provisions of the Public Sale Procedures should be read together, so that South Carolina Code section 36-9-629's "substantial compliance" language is to be read into section 36-9-630. § 36-9-629.

82. 192 S.E.2d 109 (1972), *cert. denied*, 192 S.E.2d 836 (N.C. 1972).

83. *Id.* at 111-12; *see also* Douglas v. Rhodes, 125 S.E. 261, 263 (N.C. 1924) (interpreting a statute that was substantially reenacted as North Carolina Gen. Stat. § 25-9-602); Triad Bank v. Elliott, 399 S.E.2d 1, 4 (N.C. Ct. App. 1990) (finding that a notice stating the wrong year of a car was in substantial compliance with North Carolina Gen. Stat. § 25-9-602).

84. *See* N.C. Nat'l Bank v. Burnette, 256 S.E.2d 388, 392 (N.C. 1979); ITT-Indus. Credit Co. v. Milo Concrete Co., 229 S.E.2d 814, 820 (N.C. Ct. App. 1976); *supra* note 5, at 31-32, and accompanying text.

85. 223 S.E.2d 848 (N.C. Ct. App. 1976).

mailing the notice to the debtor was unreasonable.⁸⁶ The court read North Carolina General Statutes section 25-9-603(2) to require a secured party to post at the courthouse and mail the notice.⁸⁷ The court also found that North Carolina section 25-9-603 must be construed with North Carolina General Statutes section 25-9-504(3) so that every aspect of the notice is commercially reasonable.⁸⁸ The court held that the failure to comply with the notice requirements of the Public Sale Procedures raised the presumption that the amount received in the disposition is at least equal to the amount of the debt.⁸⁹ The secured party must overcome this presumption by proving the value of the collateral by evidence other than resale value.⁹⁰ Any deficiency was subject to a credit or offset if the debtor claimed any damages or penalties under North Carolina General Statutes section 25-9-507.⁹¹ South Carolina courts have followed the rebuttable presumption that the amount received in a disposition in which notice was unreasonable is equal to the debt.⁹²

Under the old default disposition provisions in South Carolina section 36-9-504(3), the debtor did not have to actually receive the notice; the secured party only had to take reasonable actions to try and notify the debtor.⁹³ This requirement that the secured party only take reasonable measures to send notice to the debtor should not change under the Public Sale Procedures. The North Carolina Supreme Court held that North Carolina's equivalent statute to South Carolina Code section 36-9-631, North Carolina General Statutes section 25-9-603, does not insist the secured party ensure that the debtor actually receive the notice.⁹⁴

B. The Constitutionality of the Public Sale Procedures

Debtors in North Carolina attacked the Public Sale Procedures' presumption of commercial reasonableness as a violation of the procedural Due Process Clause of the Fourteenth Amendment of the United States Constitution.⁹⁵ The debtors

86. *Id.* at 850.

87. *Id.* at 850–51.

88. *Id.* at 851.

89. *Id.* at 851–52.

90. *Id.* at 852.

91. *Hodges v. Norton*, 223 S.E.2d 848, 852 (N.C. Ct. App. 1976).

92. *See, e.g., Republic Nat'l Bank v. DLP Indus., Inc.*, 314 S.C. 108, 110, 441 S.E.2d 827, 829 (1994) (interpreting Former Article 9); *Mathias v. Hicks*, 294 S.C. 305, 309, 363 S.E.2d 914, 917 (Ct. App. 1987) (interpreting Former Article 9).

93. *Altman Tractor & Equip. Co. v. Weaver*, 288 S.C. 449, 451, 343 S.E.2d 444, 445 (1986).

94. *See N.C. Nat'l Bank v. Burnette*, 256 S.E.2d 388, 392 (N.C. 1979).

95. *Id.* at 394. In *Burnette*, the North Carolina Supreme Court also considered whether the Public Sale Procedures violated the North Carolina Constitution's Due Process Clause. *Id.* The court analyzed the North Carolina Constitution and the United States Constitution in tandem and found that the Public Sale Procedures did not violate either Constitution. *Id.* at 394–95. Since the Due Process Clause in the South Carolina Constitution and the Fourteenth Amendment are almost identical, a South Carolina court should similarly find the Public Sale Procedures constitutional under South Carolina law. *See U.S. CONST. amend. XIV*, § 1; *S.C. CONST. art. I*, § 3.

argued that the Public Sale Procedures denied them the right to question the reasonableness of a public disposition in court, and thereby deprived the debtors of their property.⁹⁶ The North Carolina Supreme Court rejected the argument that the Public Sale Procedures violated an individual's right to due process.⁹⁷

The North Carolina Supreme Court recognized that Fourteenth Amendment procedural due process is violated only when the government deprives individuals of their property rights.⁹⁸ Since private individuals conducted the dispositions under the Public Sale Provisions, the court focused on whether the presumption created by the statutes was "state action."⁹⁹ The defendants argued that there was state action because the legislature deemed a public disposition under the Public Sale Provisions to be commercially reasonable.¹⁰⁰ The court found this argument "unsound and contrary to the weight of authority," and held that there was no state action.¹⁰¹ The court reasoned that to rule otherwise would make all private action taken under legislative enactments state action.¹⁰² Because the court found that there was no state action, the court did not discuss whether the defendants were deprived of procedural due process.¹⁰³

The defendants and the court in *Burnette* ignored the fact that the state provided a bulletin board in a courthouse for secured parties to post notices of disposition.¹⁰⁴ By providing and maintaining the bulletin board, does the state become an actor for the purposes of procedural due process? The United States Supreme Court has said that private conduct must be fairly attributable to the state for there to be a violation of the Due Process Clause.¹⁰⁵ Providing services that do not violate the Due Process Clause on their face does not convert the secured party's conduct into state action.¹⁰⁶ The state is a method for the secured party to give notice to the debtor; the state provides a service much like the post office in mailing the notice or a newspaper that publishes legal notices. Further, the use of the bulletin board is analogous to using a state's forms or directing a county official to record forms—actions that have been deemed not to be state actions for the purposes of the

96. *Burnette*, 256 S.E.2d at 394.

97. *Id.* at 395.

98. *Id.* at 394.

99. *Id.*

100. *Id.* at 394–95. ("The mere enactment of such legislation significantly involves the State in the disposition of collateral . . . to the point where the actions of such parties must be considered those of the State.").

101. *Id.* at 395.

102. *N.C. Nat'l Bank v. Burnette*, 256 S.E.2d 388, 394–95 (N.C. 1979).

103. *Id.*

104. *See* S.C. CODE ANN. § 36-9-631(1) (West 2003).

105. *See* *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982); *cf.* *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 173 (1972) (holding that the state must be significantly involved in the private action in the context of an equal protection claim).

106. *Cf.* *Moose Lodge*, 407 U.S. at 177 (holding a regulatory scheme does not rise to the point of state action).

Due Process Clause.¹⁰⁷ Without more, the mere use of a state bulletin board does not constitute a “state action.”

A debtor may attempt to claim that an accelerated disposition under South Carolina section 36-9-632 (an exception for perishable property) violates the debtor’s Procedural Due Process rights.¹⁰⁸ When a secured party employs this acceleration provision, the state becomes involved through the clerk of court’s role in the disposition. The clerk must first determine if the secured party’s assessment that the collateral is perishable or rapidly depreciating in value is correct.¹⁰⁹ If the clerk determines that the collateral is depreciating, the clerk may order the collateral sold at a given time and place, and with such notice that the clerk deems advisable.¹¹⁰ The clerk is not required to hold a hearing and may make the decision without input from the debtor.¹¹¹

To determine if the private action is attributable to the state, the court will follow a two-step test: the violation of the individual’s right must be caused by the exercise of a power created by the state, and the party charged with the violation must be fairly characterized as a state actor.¹¹² The first part of the test should be met if the secured party is acting under a privilege created by the state.¹¹³ The second prong of the test will create greater problems for the court in determining if the disposition was state action. In *Lugar v. Edmondson Oil Co.*, the creditor filed an ex parte petition to prevent the debtor from selling the property.¹¹⁴ The petition was presented to the clerk of court, who then issued a writ of attachment that was subsequently executed by the sheriff.¹¹⁵ The United States Supreme Court held that because the creditor, the clerk, and the sheriff acted together, the creditor’s actions were state action and, therefore, the creditor was liable for violating the debtor’s constitutional rights.¹¹⁶

The facts of *Lugar* are very similar to the statutory scheme provided for under South Carolina section 36-9-632. The courts may very well find that by working in conjunction, the secured party and the clerk of court have turned the secured party’s disposition into state action. The courts must then determine if there was a violation of the debtors’ rights, since it is not the deprivation of the constitutionally

107. See, e.g., *Jerry’s Sport Ctr., Inc. v. Novick*, 448 A.2d 404, 406 (N.H. 1982) (finding that the use of state forms or orders given to a county official is not sufficient to attribute the private party’s actions to that of the state).

108. For an explanation of South Carolina Code section 36-9-632’s procedures, see *supra* notes 54–57 and accompanying text.

109. S.C. CODE ANN. § 36-9-632 (West 2003).

110. *Id.*

111. *Id.*

112. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982).

113. See, e.g., *id.* at 941 (“[A] procedural scheme created by [a] statute obviously is the product of state action.”).

114. *Id.* at 922.

115. *Id.*

116. *Id.* at 941–42.

protected right by the state that is unconstitutional, but the deprivation without due process of law.¹¹⁷ The United States Supreme Court has held that the Constitution requires a hearing before the state deprives a debtor of his property.¹¹⁸ The Supreme Court has also found, in some instances, that a post-deprivation hearing or remedy satisfies the due process clause.¹¹⁹ The default provisions of the Revised Article 9 provide a number of pre-disposition and post-disposition remedies for a debtor who has been damaged by a secured party not complying with the Public Sale Procedures. Should the clerk provide notice to the debtor of the accelerated disposition, the debtor may petition the court to issue an order restraining the disposition.¹²⁰ After the disposition of the collateral, the debtor may also seek damages from the secured party¹²¹ or may limit any deficiency judgment sought by the secured party.¹²² Due to the available remedies both before and after the disposition, an accelerated disposition under South Carolina Code section 36-9-632 does not violate a debtor's constitutional rights.

However, if the clerk orders a disposition *without notice* to the debtor, the court may find that the secured party's actions violated the debtor's due process rights. Post-deprivation hearings and remedies are justified when the state cannot provide a meaningful hearing before the deprivation.¹²³ Since it is doubtful that a clerk will order a disposition without notice unless the collateral is quickly deteriorating or losing value, the court likely will find that accelerated disposition without notice and a hearing are justified, and the post-deprivation remedies adequately address any damages to the debtor.¹²⁴

IV. CONCLUSION

By adding the Public Sale Procedures to Revised Article 9, South Carolina has created a statutory scheme that removes consideration of commercial reasonableness from public dispositions. Dispositions under the Public Sale Procedures are conclusively reasonable if the Public Sale Procedures are followed.

This safe harbor potentially provides inadequate notice to allow a debtor to protect his interest in the collateral to be sold, yet does not infringe on a debtor's Fourteenth Amendment due process rights because the state is not a participant in

117. *Zinnermon v. Burch*, 494 U.S. 113, 125 (1990).

118. *Id.* at 127; *see, e.g., Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (finding that the Due Process Clause requires that "an individual be given an opportunity for a hearing before he is deprived of any significant property interest"); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (stating that some form of notice and hearing is required, at a minimum).

119. *See Zinnermon*, 494 U.S. at 128.

120. *See S.C. CODE ANN.* § 36-9-625(a) (West 2003).

121. *Id.* § 36-9-625(b)-(c).

122. *Id.* § 36-9-626(3).

123. *See Parratt v. Taylor*, 451 U.S. 527, 538 (1981).

124. Private misuse of a valid statute does not create a deprivation attributable to the state. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982).

the disposition. However, the safe harbor prevents the debtor from challenging the disposition of the collateral even if the collateral is sold far below its market value or if there are no bids at all. Under the Public Sale Procedures, this presumption of commercial reasonableness does not infringe on a debtor's rights.

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